landlord on the expiration of the lease. Either party was at liberty to determine the lease at the end of the term thereby created by delivering on the other party at least two months' notice in writing. So long as the tenant performed and observed all the terms and conditions of the lease and paid all rents regularly up to such determination, the lease would continue until the term thereby stipulated, whereupon immediately after, it shall cease and become void without prejudice to any claim by the landlord in respect of any antecedent breach of any covenant or condition contained therein. The landlord is only entitled to serve notice to quit on the tenant if he commits any breach of the stipulation during the period of the lease including the failure to pay the monthly rental due. The expression 'landlord' in the recital includes, where the context so admits, the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term thereby created. It was also covenanted that the defendant as tenant should pay all the rates and taxes such as water, electricity and conservancy rates except the quit rent. The landlord retained possession of a room in the front portion of the ground-floor for many years and had full use of the water, electricity and lavatory "without any interruption, molestation or disturbance whatever" at the expense of the tenant. When the landlord vacated the room, the defendant, according to the agreement, went into occupation thereof and henceforth paid an increased monthly rental of $300. The tenant was also responsible to keep the premises in good and tenantable condition and repair upon notice given by the landlord requiring such repairs to be carried out. For that purpose the tenant would have to permit the landlord or his agent to enter upon the premises or any part thereof in order to view the condition.

Taking into consideration the facts and circumstances, it is clear there was in the minds of the parties the certainty as to the period of tenure and the terms of conditions thereof. Their intention was to have a lease for forty years and the agreement had been partly executed by possession having been taken under it and the tenant having all along complied with the terms and stipulations and paying the rents regularly without fail.

In my opinion the defendant should be entitled to the order of specific performance of the agreement.

As regards the second prayer in his counterclaim, I would quote Ong C.J. (as he then was) in *Yong Tong Hong's* case, *supra* at page 108: —

"Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221(3)(b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less."

In the next paragraph, His Lordship continues: —

"I need hardly add that the respondents take the premises subject to the agreement which binds their predecessor in title to give the appellant a lease of the premises.... Although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. The validity of contracts relating to alienated land or any interest therein is explicitly declared in section 206(3) of the National Land Code."

In the present case, it seems to me to be a lease of the whole land. "Surat Sewa Tanah Raja" is lease of State land as defined in section 2 of the Kedah Land Enactment. Under the National Land Code it is alienated land for which a lease of the maximum term of ninety-nine years is allowed under section 221(3)(a). I therefore order the plaintiffs to execute a registrable lease for the residue term of twenty-four years.

In the circumstances the plaintiffs' claim for vacant possession of the premises and for mesne profits is dismissed with costs on the ground that the notice served on the defendant is of no effect and therefore rendered invalid.

I would allow the defendant's counterclaim with costs.

Order accordingly.

Solicitors: *Cheang Lee & Ong; Lim Kean Chye & Co.*

RETNAM PILLAI v. BAHAGIA TRADING AGENCY

[A.C.J. (Mohamed Zahir J.) May 24, 1976]
[Seremban — Civil Appeal No. 8 of 1975]

Practice and Procedure — Liquidated claim — Appellant granted adjournments several times to file defence or settle matter — Judgment finally entered against appellant — Appellant present in court at material time — Appeal against judgment — Subordinate Court Rules, 1950, O. 1 r. 2, O. 19 rr. 3 & 4, O. 36 rr. 9 & 14.

The appellant had failed to file a defence to the respondents' liquidated claim for goods sold and delivered in the sum of $1,471.25. On the first date for mention, the appellant's application to file the defence was allowed and on the second date, the respondents agreed to the appellant's request for time to settle the matter. On the third occasion the appellant again requested for time and this request was granted as the final one. On the last date again the appellant had failed either to settle the matter or to file the defence. The learned magistrate then entered judgment against the appellant, who was present in court at the material time.

The appellant appealed against the decision of the learned magistrate who refused the application of the appellant to set aside the magistrate's own judgment and to order the case reinstated for hearing. The learned magistrate contended that the judgment was entered *inter partes* hence he had no power to set it aside and the appellant's remedy was to appeal against the judgment.

Held, dismissing the appeal: (1) it is the intention of the legislature that in cases of *inter partes* judgment the setting aside of the said judgment should be by way of appeal;

(2) the appellant, in his application to set aside the judgment of the magistrate, had failed to base his application on the irregularities of the proceedings;

(3) the judgment in the instant case was irregular but by virtue of Order 36 rule 9 it will not render the proceedings void unless the court shall so order. The power to set aside any irregular proceedings under rule 9(1) appears to be confined only to proceedings but not to the judgment already entered.

Cases referred to:-

(1) *Abdul Majeed* v. *Boor Singh* [1970] 2 M.L.J. 4.
(2) *Leow Boke Chooi* v. *Asia Motor Co. Ltd.* [1967] 2 M.L.J. 109.
(3) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 234.

CIVIL APPEAL.

S. Periasamy for the appellant.

S. Sagadeva for the respondents.

Mohamed Zahir J.: In this case the appellant appealed against the decision of the learned magistrate who refused the application of the appellant to set aside the magistrate's own judgment and to order the case reinstated for hearing. The appellant in the case had failed to file a defence to the respondents' liquidated claim for goods sold and delivered in the sum of $1,471.25. On the first date of mention in the magistrate's court the appellant asked for time to file the defence and this request was allowed. On the second date the appellant "wanted time to settle matter" and the respondents agreed to this request. On the third occasion the appellant again requested for time and again this request was granted as the final one. On the last date again the appellant had failed either to "settle the matter" or to file the defence. The learned magistrate at this stage entered judgment against the appellant as prayed in the statement of claim. The appellant was present in court when this judgment was entered against him

Lastly the appellant filed an application supported by an affidavit to have the judgment set aside and the case re-instated. The grounds given in the affidavit appeared to be as follows: —

(a) that the case had been referred to arbitration; and

(b) that he had sufficient grounds to defend the action.

However what actual grounds the appellant had in order to defend the claim were not disclosed in the affidavit. The learned magistrate dismissed this application against which the appellant appealed. However in the grounds of appeal an important ground that was not before the court below was pleaded that the judgment of the magistrate was irregular for non-compliance with and not being in accordance with Order 19 rule 4 of the Subordinate Courts Rules. This Order requires the court to permit in cases in which the defendant has not filed a defence or having filed a defence does not appear at the trial the plaintiff's case be proved by evidence on affidavit or require the case be proved by oral evidence. However under Order 19 rule 3, it is provided that when any action is called where the defendant does not appear, the court may (subject to formal proof of due service) where the claim is for a liquidated sum, enter judgment forthwith for the plaintiff.

In this case the defendant was present at the hearing and it was therefore wrong on the part of the learned magistrate to enter judgment forthwith for the respondents. The learned magistrate should have required the respondents to adduce some evidence to support their claim before recording the judgment. However had the appellant appealed against the substantive judgment of the learned magistrate he would have succeeded in his appeal. But the appellant chose to apply to the same court to have the order set aside and failed to base his application on the important ground of irregularity and the learned magistrate was therefore deprived of considering the point. Anyway the learned magistrate in dismissing the application by the appellant to set aside his own judgment contended that the judgment was entered *inter partes* hence he had no power to set it aside and the appellant's remedy was to appeal against the judgment.

Mr. Periasamy counsel for the appellant argued that the learned magistrate had the powers to set aside his own judgment if such judgment was obtained by default of defence. He also argued that there was no provision in the Subordinate Courts Rules for setting aside judgments in default of defence and where the defendant was present at the time of the judgment although the Rules, as he contended, expressly provided the procedure for setting aside judgment in cases of default of appearance. Counsel therefore submitted that that being the case the Rules of the Supreme Court be adopted (Order 1 rule 2 of the Subordinate Courts Rules).

Now, before we go further, we have to examine whether the Subordinate Courts Rules do not have any procedure for setting aside any judgment in default of defence and where the defendant was present at the time of judgment. Obviously under the Rules there is no such procedure. And this leads to another question whether it is the intention of the legislature not to allow setting aside *inter partes* judgment by the same subordinate court and that the procedure intended to be is by way of appeal.

On examining the Rules closely I am of the opinion that it is the intention of the legislature that in cases of *inter partes* judgment the setting aside of the said judgment should be by way of appeal. My reason for saying so is that the rules expressly provide the procedure for setting aside by the magistrate under Order 19 rule 3(3) in cases of default of appearance but no such provision is made under the following rule 4 in cases of undefended actions. My view is that this omission is not inadvertence and the intention is that the defendant should set aside the judgment by way of appeal. My view is further fortified after examining Order 36 rule 14 which sets out the procedure where a defendant is precluded from defending an action. Rule 14(b) and (d) reads as follows: —

"If in any action it is ordered that a defendant be precluded from defending —

(a) x x x

(b) he should be permitted to attend the trial of the action, but not to take any part therein.

(c) x x x

(d) for the purpose of any appeal or further proceedings the judgment shall be deemed to have been given *inter partes*."

Even the decided cases cited in this appeal, *Abdul Majeed* v. *Boor Singh*[1] and *Leow Boke Chooi* v. *Asia Motor Co. Ltd.*[2] were actually appeals from the substantive judgment of the magistrate. Obviously the judgment in the instant case was irregular but by virtue of Order 36 rule 9 it will not render the proceedings void unless the court shall so order. The power to set aside any irregular proceedings under rule 9(1) appears to be confined only to proceedings but not to the judgment already entered.

Even if I were wrong in holding that the magistrate does not have power to set aside his own judgment in such cases, this appeal cannot succeed on

another ground. In making the application to set aside the judgment of the magistrate the appellant had failed to base his application on the irregularities of the proceedings. He however based his application on his having a good defence and that the case had been referred to arbitration.

In the appeal before me a fresh point of law that is the irregularities of the proceedings was raised in addition to the other two grounds. In this respect I would quote the case of *Rengasamy Pillai* v. *Comptroller of Income Tax*[3] wherein Lord Diplock stated *inter alia* —

"As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgment in the court below...."

Accordingly I dismissed this appeal with costs. I also ordered the deposit of $150 made by the appellant in this appeal to be paid to the respondents as part of the costs.

Appeal dismissed.

Solicitors: *Nahappan, Muthu & Peri; Pasupathy & Co.*

PUBLIC PROSECUTOR v. SANDRA MARGARET BIRCH

[R.Cr.J. (Arulanandom J.) August 27, 1976]
[Penang — Arrest Case No. PG 207/1976]

Criminal Law and Procedure — Scope of s. 27 of the Evidence Act, 1950 — Whether statement of accused in the course of police investigation could be admissible under provision of s. 27, Evidence Act — Criminal Procedure Code (F.M.S. Cap. 6), s. 113 — Courts of Judicature Act, 1974, s. 35.

Evidence — Statement in the course of police investigation — Whether admissible under s. 27, Evidence Act, 1950.

The Deputy Public Prosecutor sought to be admitted a statement by the accused that subsequently led the police to the drugs. The learned President, Sessions Court held the view that any statement or information given must fulfil the requirements of section 113 of the Criminal Procedure Code and that by implication section 27 of the Evidence was no longer in force. Accordingly, he ruled that the accused's statement was inadmissible.

Held, reversing the lower court's decision: all statements if they fall within the province of section 27 of the Evidence Act are admissible in the courts of law. Such admissions are not repugnant to the amended section 113 of the Criminal Procedure Code.

Cases referred to:-

(1) *R.* v. *Ramasamy* [1934] 3 W.L.R. 632 (P.C.), 639.

(2) *Pulukuri Kottaya* v. *King-Emperor* (1946-47) L.R. 74 I.A. 77.

DIRECTION UNDER SECTION 35 OF THE COURTS OF JUDICATURE ACT.

Arulanandom J.: My attention was drawn to a report in the *New Straits Times* of Thursday, August 19, 1976, about the conduct of a criminal case in the Sessions Court, Penang on August 18. According to the report the Court President ruled that section 27 of the Evidence Act was abrogated by the amendment to section 113 of the Criminal Procedure Code. The exact words used in the report were as follows:—

"DPP Ghazi Ishak then applied to Sessions Court President Christopher Fernando to admit a statement by Birch that subsequently led police to the drugs.

The DPP said the court could hold a trial within a trial to determine if the statement was admissible.

Defence counsel Mr. Karpal Singh, assisted by Mr. K. Kumaraendran said that under the new amendment to section 113, of the Criminal Procedure Code, no statement of an accused could be admitted as evidence, if no caution had been administered.

The court president ruled Birch's statement inadmissible. He said that section 27 of the Evidence Ordinance was abrogated by the amendment to section 113 of the Criminal Procedure Code."

As in my opinion the ruling was positively wrong I exercised my powers under section 35 of the Courts of Judicature Act and called for the records of the case.

Section 35 of the Courts of Judicature Act gives the High Court general supervisory and revisionary jurisdiction over all subordinate courts, and, if it appears desirable in the interests of justice at any stage in any matter or proceeding in any subordinate court, the High Court may call for the record thereof and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

The records do not repeat the words which appeared in the newspaper but a general reading of it makes it abundantly clear that that was the view that the learned President held. The record reads as follows:—

"DPP applies that the court admit a statement made by the accused which led to the recovery of the exhibit 2 under section 27.

Tan Hung Song v. *R.* [1951] M.L.J. 181 is a guide as far as section 27 is concerned.

Mr. Karpal Singh replies. Amendment to section 113 — there must be a caution — otherwise the statement is not admissible.

To 2.15 p.m. continued. (H)

DPP requests that he makes further submission.

In order to understand the amended section 113 — The old section states etc.... section 27 has not been repealed — That was not the intention of the legislature.

Mr. Karpal replies — The amendment to section 113 is clear — It talks about a statement — There are no exceptions — The statement ought to be excluded.

Ct. I rule that the amendments to section 113 requires 2 things:

(1) before arrest the Ct. must be satisfied that no threat, inducement or promise was used.

(2) after arrest a proper caution ought to be administered."

Although it is not stated in the record, it is quite clear that the statement was not admitted as the learned President held the view that any statement or information given must fulfil the requirements of section 113 of the Criminal Procedure Code and that by implication section 27 of the Evidence Act was no longer in force. Section 27 of the Evidence Act is a section which stands by itself in the Evidence Act. The section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true, which accordingly can be safely allowed to be given in evidence.

The confusion seems to have arisen because of the wording of the old section 113 of the Criminal